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In the Supreme Court of the United States

OCTOBER TERM, 1984

J. H. MCQUISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, a defense contractor, contends that the court of appeals erred in affirming the decision of the Armed Services Board of Contract Appeals upholding the termination of petitioner's contract for default.

1. Petitioner manufactured radar components called "networks" for a missile guidance system. Between 1964 and 1980, he entered into 12 contracts with the government for delivery of networks (Pet. App. A4). With respect to many of these contracts, including the one at issue here, petitioner experienced difficulty obtaining from suppliers a part, known as a "relay," that was necessary for manufacture of the networks.

Petitioner entered into the contract at issue in December 1978; it called for delivery of 216 networks by October 16, 1979 (Pet. App. A26). In March 1979 petitioner entered into another contract, calling for delivery of 65 networks by April 21, 1980 (*id.* at A27). Because the sales price was

higher under the second contract, petitioner used relays he had ordered for the contract at issue in networks delivered under the second contract (*ibid.*). Delivery of the 65 networks under the second contract was made in June 1979 (*ibid.*). Petitioner subsequently delivered 112 of the 216 networks under the contract at issue, but, on October 16, 1979, the delivery date under the contract, the remaining 104 networks had not been delivered, due to a lack of relays (*id.* at A27-A28).

The contract was subject to the Defense Priorities System established pursuant to the Defense Production Act of 1950, 50 U.S.C. App. 2061 *et seq.* (Pet. App. A28). Under this system, defense contractors may seek government assistance in obtaining delivery from nonperforming suppliers (*id.* at A28-A29). Petitioner did not seek government assistance in obtaining delivery of the relays under the Defense Priorities System until after the delivery date had passed (*id.* at A44). The contracting officer in charge of petitioner's contract found him in default and terminated the contract on December 17, 1979 (*id.* at A36).[1]

2. Petitioner challenged the termination before the Armed Services Board of Contract Appeals. After a hearing, the Board found that petitioner contributed to his delinquency by diverting relays ordered for the first contract to the second contract (Pet. App. A40). It also found that petitioner was familiar with the procedures for obtaining government assistance under the Defense Priorities System and made a calculated decision not to use that system before the delivery date (*id.* at A44). The Board concluded that a request for government assistance made after the

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[1]The applicable regulations provide that "the Government has the right * * * to terminate the whole or any part of the contract for default if the contractor (i) fails to make the delivery of the supplies * * * within the time specified in the contract" (32 C.F.R. 8-602.1).

delivery date is untimely (*ibid.*). Accordingly, the Board concluded that petitioner had not shown that his failure to make timely delivery was due to an excusable cause and held that the contract was properly terminated for default (*id.* at A45).

Petitioner sought review of the Board's decision in the Federal Circuit, arguing that he was entitled to de novo consideration of his claims by the appellate court. The court of appeals held that, under *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), petitioner was not entitled to de novo review (Pet. App. A54). Instead, the standard was whether the Board's factual determinations were supported by substantial evidence (*id.* at A54-A55). The court added that the Board's "conclusions of law are, of course, freely reviewable by this court" (*id.* at A55 n.1). The court affirmed the Board's decision, observing that an "essential factor" in petitioner's failure to complete performance of the contract in a timely manner was his own business decision to use parts ordered for the contract at issue so that he could make early delivery of networks under the subsequent, more profitable contract (*id.* at A55). The court concluded that the finding of default was proper because petitioner "has not shown that its failure to make timely delivery was due to excusable causes" (*id.* at A56).

3. Petitioner first contends (Pet. 19-25) that the court of appeals erred in refusing to consider his factual claims de novo. Petitioner does not specify what claims were erroneously rejected by the court of appeals because it applied the substantial evidence standard. Moreover, petitioner offers no plausible basis for his contention that he was entitled to de novo review of his factual claims. As the court of appeals concluded (Pet. App. A54), this Court held in *Utah Construction* that factual issues concerning government contracts that are resolved by an administrative board are not to be tried de novo by a reviewing court (384 U.S. at

419-420). Congress adopted that standard in the Contract Disputes Act of 1978, 41 U.S.C. 609(b), expressly providing that factual determinations by boards of contract appeals are "final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence".[2]

Contrary to petitioner's argument, the Court's decision in *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), does not entitle him to de novo review of factual issues by an Article III court. The Bankruptcy Act at issue in *Northern Pipeline* conferred on Article I bankruptcy judges the full jurisdiction of district courts in proceedings "related to" bankruptcy cases. 28 U.S.C. 1471(b). In contrast, the Contract Disputes Act provides for adjudication of a narrow category of statutory contract rights created by Congress. The Court recognized in *Northern Pipeline* that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated" (458 U.S. at 80, citing *Crowell* v. *Benson*, 285 U.S. 22 (1932)).[3] Thus, *Northern Pipeline* does not support petitioner's far-reaching contention that factual determinations of agency boards must be reconsidered de novo by an Article III court.[4]

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[2]The Act provides that "the decision of the agency board on any question of law shall not be final or conclusive" (41 U.S.C. 609(b)).

[3]The "related cases" over which bankruptcy courts exercised jurisdiction involved adjudication of "private rights." The Contract Disputes Act, in contrast, involves "public rights," over which Congress has broad discretion, since disputes under the Act involve the government and a private party, with the private party's suit permitted by the government's waiver of sovereign immunity. See *Northern Pipeline Co.*, 458 U.S. at 67-72.

[4]Indeed, the discussion in the *Northern Pipeline* plurality opinion of the distinctions between *Northern Pipeline* and *Crowell* v. *Benson*, *supra*, shows that the congressional scheme for adjudication of

Petitioner also contends (Pet. 25-34) that the court of appeals erred in upholding the termination of his contract because it thereby approved the imposition of a penalty not authorized by the Defense Production Act. He argues that this decision is inconsistent with *Acorn Iron & Supply Co.* v. *Bethlehem Steel Co.*, 96 F. Supp. 481 (E.D. Pa. 1951), in that respect. Petitioner is mistaken. The Defense Production Act authorizes the President to establish priorities for performance by suppliers under certain defense contracts (50 U.S.C. App. 2071). It permits the President to seek injunctions against violators of the statute (50 U.S.C. App. 2156) and establishes criminal penalties for such violations (50 U.S.C. App. 2073). In *Acorn,* the district court simply held that only the government, and not a contractor seeking to compel performance by his supplier, could invoke the remedies listed in the Defense Production Act. The decision in *Acorn* is not relevant to the issue presented by petitioner. Nothing in *Acorn* or the Defense Production Act limits the government's power to terminate an overdue contract.[5]

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government contract disputes is permissible. First, the plurality noted that "the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law" (458 U.S. at 85). Boards of contract appeals make similarly specialized determinations. Second, "the agency in *Crowell* engaged in statutorily channeled factfinding functions" (*ibid.*). The Contract Disputes Act channels the activities of boards of contract appeals. Third, while the agency in *Crowell* possessed limited powers, the bankruptcy courts challenged in *Northern Pipeline* had broad powers, including the power to preside over jury trials, the power to issue declaratory judgments, and the power to issue writs of habeas corpus (*ibid.*). The power of boards of contract appeals is relatively limited. Fourth, "while orders issued by the agency in *Crowell* were to be set aside if 'not supported by the evidence,' the judgments of the bankruptcy courts are apparently subject to review only under the more deferential 'clearly erroneous' standard" (*ibid.*). The factual findings of boards of contract appeals are judged by the less deferential "substantial evidence" standard.

[5]Petitioner repeatedly suggests (Pet. 24, 25, 29) that there is a conflict among the circuits on the issues he raises, but he does not explain the nature of this conflict or list the cases allegedly in disagreement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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